A

Lai Soon Onn v Chew Fei Meng and other appeals

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCC)-2221–12 OF 2016, W-02(IM)(NCC)-324–02 OF 2017, W-02(IM)(NCC)-325–02 OF 2017 AND W-02(IM)(NCC)-326–02 OF 2017

TENGKU MAIMUN, NALLINI PATHMANATHAN AND ZABARIAH YUSOF JJCA

30 MARCH 2018

C

Civil Procedure — Striking out — Appeal against order allowing striking out — Plaintiff filed action against defendants for breach of statutory duties and tort of conspiracy — Plaintiff alleged defendants were persons acting in concert with parties unknown, in acquiring jointly and severally control of company through their collective shares in company — Defendants applied to strike out plaintiff's action — Whether plaintiff had locus standi and existing right — Whether ruling from Securities Commission was a requirement before s 357 of the Capital Markets and Services Act 2007 ('the CMSA') applied — Whether compliance with the Malaysian Code on Take-Over and Mergers 2010 was a relevant requirement under the CMSA — Whether non-joining of other parties as co-defendants amounted to a release — Rules of Court 2012 O 18 r 19(1)(a)

D

E

F

Securities — General mandatory offer — Control of shares — Defendants failed to make mandatory general offer — Plaintiff filed action against defendants for breach of statutory duties — Whether ruling from Securities Commission was a requirement before s 357 of the Capital Markets and Services Act 2007 ('the CMSA') applied — Whether compliance with the Malaysian Code on Take-Over and Mergers 2010 was a relevant requirement under the CMSA — Whether plaintiff had right to apply to court to compel defendants to undertake mandatory general offer — Capital Markets and Services Act 2007 ss 217–220, 357 & 360 — Malaysian Code on Take-Over and Mergers 2010 s 9(1)

G

H

Tort — Conspiracy — Allegation of — Plaintiff filed action against defendants for breach of statutory duties and tort of conspiracy — Plaintiff alleged defendants were persons acting in concert with parties unknown, in acquiring jointly and severally control of company through their collective shares in company — Whether non-joining of other parties as co-defendants amounted to a release

I

The plaintiff's pleaded claim against the first ('D1'), second ('D2'), third ('D3') and fourth ('D4') defendants was that, they were persons acting in concert with parties unknown, in acquiring jointly and severally the control of Panpages

Bhd ('D5') through their collective shareholding of 33.74% shares in D5. The plaintiff was a former employee and shareholder of 3,600 shares of D5. The plaintiff submitted that D1, D2, D3 and D4 had breached their statutory duties under the Capital Markets and Services Act 2007 ('the CMSA') and the Malaysian Code on Take-Over and Mergers 2010 ('the Code') for their failure to make a mandatory general offer ('MGO') upon assuming control of D5 on 27 March 2012. The plaintiff further argued that D1, D2, D3 and D4, together with unknown parties had unlawfully conspired prejudicing the plaintiff's economic interest through unlawful means. In his statement of claim, the plaintiff sought for, inter alia, declaratory as well as other reliefs that: (a) D1–D4 were persons acting in concert to obtain control of D5; (b) D1–D4 had contravened s 218(2) of the CMSA and s 9(1) of the Code upon their failure to undertake a MGO for the shares in D5; (c) damages for the losses suffered by the plaintiff as a result of the alleged breach of statutory duties by D1–D4; and (d) an order to compel D1–D4 to undertake a MGO. D1, D2, D3 and D4 subsequently filed their applications to strike out the plaintiff's claim under O 18 r 19(1)(a) of the Rules of Court 2012 ('the ROC'). The applications were allowed, hence, the present appeal. The issues arose in the present appeal were: (i) whether the plaintiff had the locus standi and existing right; (ii) whether a ruling from the Securities Commission ('the SC') was a requirement before s 357 of the CMSA applied; (iii) whether compliance with the Code was a relevant requirement under the CMSA; and (iv) whether the non-joining of the other parties as co-defendants amounted to a release. The defendants submitted that the plaintiff's claim could not be sustained as against D1, D2 and D4 in view of the court granting the application of striking out by D3 earlier which rendered the threshold of 33% requirement no longer available for the MGO to take effect ('the defendants' argument').

Held, dismissing the appeal with costs and affirming the decision of the learned judicial commissioner:

(1) The tort of unlawful conspiracy did not give the court the power to grant the declaratory order that the defendants contravened the provisions of the CMSA. The plaintiff must have an existing legal right, to be entitled to the declaratory reliefs sought. The facts and circumstances of the present case showed that the plaintiff did not possess the required standing or the legal right to seek for the declaratory reliefs prayed for in the claim (see para 33).

(2) By the very nature of the declaratory reliefs prayed for, essentially the plaintiff sought a declaration that the defendants committed a criminal offence under the CMSA. It was not for the civil courts to intrude into the domain of the criminal court. That could not be the intention of s 357 of the CMSA. Further, it was the prerogative of the attorney general under art 145(3) of the Federal Constitution to institute, conduct or discontinue any proceedings for an offence. By asking for the declaratory

reliefs, the plaintiff was urging the court to usurp the powers of the public prosecutor, who has control of criminal prosecutions in the country (see paras 39–40).

(3) It was the intention of the CMSA that the bodies established under the CMSA were regulatory bodies and it was not the function of the court to usurp their function nor to second guess their decisions. A person who had suffered loss or incurred damage may institute a civil action to recover the amount of the loss or damage after a contravention of any provision or any regulations made under the CMSA had been determined by the SC. It was not necessary for the courts to adjudicate whether there was a contravention of the CMSA before s 357(1) of the CMSA could be applied. All that was required was for the SC first to determine whether there was a contravention (see paras 43–44).

(4) Guided by the principle of construction in the case of *Yung Ing Ing v Hunfara Construction Sdn Bhd* [2015] 5 MLJ 668, the court found that, since the word 'requirement' was not found in ss 217–220 of the CMSA, it must therefore followed that it was never the intention of the Parliament when it legislated s 360 of the CMSA to confer on the plaintiff a right to apply to court to compel the defendants to undertake an MGO. The rights of the minority shareholders to apply to the courts for an order to compel the defendants to undertake the MGO were provided for under ss 223 and 224 of the CMSA, however the said provisions did not provide for a private right to enforce the Code (see paras 55–56 & 60).

(5) Such findings on the release of the joint tortfeasors due to non-inclusion, was too early to be determined at this stage, and the learned judicial commissioner erred in this respect when she concluded that the non-inclusion of the other tortfeasors amounted to a release of their liability. The application for striking out herein was under limb (a) of O 18 r 19(1) of the ROC and therefore no other evidence except the pleadings which was available before the court. Whether there was a release of the other joint torfeasors was a matter for the defendants to plead in their respective defences and for the learned judicial commissioner to decide after hearing the evidence, whether there was indeed an intention of the plaintiff to release the other joint tortfeasors. In the present case the defendants have yet to file their defences (see para 71).

(6) The defendants' argument could not stand. The claim was that all the defendants had contravened the CMSA in failing to make the MGO and they had engaged in an unlawful conspiracy to deprive the plaintiff of the MGO. The act of the defendants ought to be taken together. It was

unfortunate that the striking out action by D3 was heard earlier. In any event, the defendants' appeals were all taken together before the court (see para 73).

[Bahasa Malaysia summary

Tuntutan yang dipli plaintif terhadap defendan-defendan pertama ('D1'), kedua ('D2'), ketiga ('D3') dan keempat ('D4') adalah bahawa, mereka merupakan orang-orang yang bertindak bersesama dengan pihak-pihak yang tidak diketahui, untuk mendapatkan secara bersama dan berasingan kawalan Panpages Bhd ('D5') melalui pegangan saham mereka secara kolektif untuk 33.74% saham dalam D5. Plaintif merupakan bekas pekerja dan pemegang saham 3,600 saham D5. Plaintif berhujah bahawa D1, D2, D3 dan D4 telah melanggar kewajipan statutori mereka di bawah Akta Pasaran Modal dan Perkhidmatan 2007 ('APMP') dan Kod Pengambilalihan dan Penggabungan Malaysia 2010 ('Kod tersebut') kerana kegagalan mereka untuk membuat tawaran umum secara mandatori ('TUM') selepas mendapat kawalan ke atas D5 pada 27 Mac 2012. Plaintif selanjutnya berhujah bahawa D1, D2, D3 dan D4 bersama dengan pihak-pihak yang tidak dikenali telah secara tidak sah berkonspirasi untuk menjejaskan kepentingan ekonomi plaintif melalui cara haram. Dalam penyataan tuntutannya, plaintif memohon untuk, antara lain, deklarasi dan juga relief-relief lain bahawa: (a) D1–D4 merupakan orang-orang yang bertindak secara bersesama untuk mendapatkan kawalan ke atas D5; (b) D1–D4 telah melanggar s 218(2) APMP dan s 9(1) Kod tersebut kerana kegagalan mereka untuk mengambil suatu TUM untuk saham dalam D5; (c) ganti rugi untuk kerugian yang dialami oleh plaintif akibat daripada pelanggaran kewajipan statutori yang dikatakan oleh D1–D4; dan (d) perintah untuk memaksa D1–D4 mengambil suatu TUM. D1, D2, D3 dan D4 akhirnya telah memfailkan permohonan mereka untuk membatalkan tuntutan plaintif di bawah A 18 k 19(1)(a) Kaedah-Kaedah Mahkamah 2012 ('KM'). Permohonan-permohonan telah dibenarkan, justeru, rayuan ini. Isu-isu yang timbul dalam rayuan ini adalah: (i) sama ada plaintif mempunyai locus standi dan hak sedia ada; (ii) sama ada keputusan daripada Suruhanjaya Sekuriti ('SC') adalah suatu keperluan sebelum s 357 APMP terpakai; (iii) sama ada pematuhan dengan Kod tersebut adalah keperluan relevan di bawah APMP; dan (iv) sama ada pihak-pihak lain yang tidak bergabung sebagai defendan-defendan bersama merupakan suatu pelepasan. Defendan-defendan berhujah bahawa tuntutan plaintif tidak boleh dikekalan terhadap D1, D2, D3 dan D4 kerana mahkamah telah memberikan permohonan pembatalan oleh D3 terdahulu yang menjadikan keperluan nilai ambang 33% tidak ada lagi supaya TUM terpakai ('hujah defendan-defendan').

Diputuskan, menolak rayuan dengan kos dan mengesahkan keputusan pesuruhjaya kehakiman yang bijaksana:

(1) Tort mengenai konspirasi yang tidak sah tidak memberikan mahkamah

kuasa untuk memberikan perintah deklarasi bahawa defendan-defendan telah melanggar peruntukan-peruntukan APMP. Plaintif perlu ada hak sah yang sedia ada, untuk berhak kepada relief-relief deklaratori yang dipohon. Fakta dan keadaan kes ini menunjukkan bahawa plaintif tidak memiliki kedudukan yang diperlukan atau hak sah untuk memohon relif-relif deklaratori yang dipohon dalam tuntutan itu (lihat perenggan 33).

(2) Berdasarkan jenis relif-relif deklaratori yang dipohon, terutamanya plaintif memohon satu deklarasi bahawa defendan-defendan telah melakukakn kesalahan jenayah di bawah APMP. Ia bukan untuk mahkamah sivil campur tangan dalam bidang kuasa mahakmah jenayah. Ini bukan niat s 357 APMP. Selanjutnya, ia adalah prerogative Ketua Hakim Negara di bawah perkara 145(3) Perlembagaan Persekutuan untuk memulakan, menjalankan atau tidak meneruskan apa-apa prosiding untuk suatu kesalahan. Dengan memohon relief-relief deklaratori, plaintif mendesak mahkamah merampas kuasa pendakwa raya, yang mempunyai kawalan untuk pendakwaan jenayah dalam negara ini (lihat perenggan 39–40).

(3) Ia adalah niat APMP bahawa badan-badan yang ditubuhkan di bawah APMP adalah badan-badan kawal selia dan ia bkan fungsi mahkamah untuk merampas fungsi mereka atau pun menggangu keputusan mereka. Seseorang yang mengalami kerugian atau menanggung kerosakan boleh memulakan tindakan sivil untuk mendapat balik jumlah kerugian atau kerosakan selepas suatu pelanggaran mana-mana peruntukan atau mana-mana peraturan yang dibuat di bawah APMP telah ditentukan oleh SC. Ia tidak perlu untuk mahkamah mengadili sama ada terdapat pelanggaran APMP sebelum s 357(1) APMP boleh terpakai. Apa yang perlu adalah untuk SC terlebih dahulu menentukan sama ada terdapat suatu pelanggaran (lihat perenggan 43–44).

(4) Berpandukan prinsip penggubalan dalam kes *Yung Ing Ing v Hunfara Construction Sdn Bhd* [2015] 5 MLJ 668, mahkamah mendapati bahawa, oleh kerana perkataan 'requirement' tidak didapati dalam ss 217–220 APMP, ia hendaklah dengan itu diikuti bahawa ia bukan niat Parlimen apabila ia menggubal s 360 APMP untuk memberikan kuasa ke atas plaintif suatu hak untuk memohon kepada mahkamah bagi memaksa defendan-defendan mengambil suatu TUM. Hak minoriti pemegang saham untuk memohon kepada mahkamah bagi perintah memaksa defendan-defendan mengambil suatu TUM adalah diperuntukkan di bawah ss 223 dan 224 APMP, bagaimanapun, peruntukan tersebut tidak memperuntukan hak persendirian untuk menguatkuasakan Kod tersebut (lihat perenggan 55–56 & 60).

(5) Dapatan sedemikian berhubung pelepasan pelaku tort bersesama akibat tidak dimasukkan sebagai pihak-pihak, adalah terlalu awal untuk

ditentukan di peringkat ini, dan pesuruhjaya kehakiman yang bijaksana terkhilaf berkenaan ini apabila beliau memutuskan bahawa pelaku-pelaku tort lain yang tidak dimasukkan merupakan suatu pelepasan daripada liabiliti mereka. Permohonan untuk pembatalan di bawah cabang (a) A 18 k 19(1) KM dan oleh itu tiada keterangan lain kecuali pliding yang sedia ada di hadapan mahkamah. Sama ada terdapat pelepasan pelaku-pelaku tort bersesama yang lain adalah suatu perkara untuk dipli oleh defendan-defendan dalam pembelaan-pembelaan mereka dan untuk pesuruhjaya kehakiman yang bijaksana memutuskan selepas mendengar keterangan, sama ada memang terdapat niat plaintif untuk melepaskan pelaku-pelaku tort bersesama yang lain. Dalam kes ini defendan-defendan masih belum memfailkan pembelaan-pembelaan mereka (lihat perengan 71).

(6) Hujah defendan-defendan tidak dapat dikekalkan. Tuntutan adalah bahawa kesemua defendan-defendan telah melanggari APMP kerana gagal membuat TUM dan mereka telah terlibat dalam konspirasi yang tidak sah untuk menafikan plaintif TUM itu. Perbuatan defendan-defendan patut diambil bersama. Adalah malang kerana tindakan pembatalan oleh D3 telah didengar terlebih dahulu. Dalam apa keadaan, rayuan-rayuan defendan-defendan kesemuanya telah diambil bersama di hadapan mahkamah (lihat perenggan 73).]

Notes

For a case on allegation of consipracy, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) para 82.

For a case on appeal against order allowing striking out, see 2(5) *Mallal's Digest* (5th Ed, 2017 Reissue) para 9278.

For a case on control of shares, see 11(1) *Mallal's Digest* (5th Ed, 2018 Reissue) para 935.

Cases referred to

Barnato (deceased); Joel and Another v Sanges and Others, Re [1949] 1 All ER 515; [1949] Ch 258, CA (refd)

Bursa Malaysia Securities Bhd v Gan Boon Aun [2009] 4 MLJ 695, CA (refd)

Chan Kern Miang v Kea Resources Pte Ltd [1998] 2 SLR (R) 85, CA (refd)

Dato Abdullah bin Ahmad & Ors v Bank Bumiputra Malaysia Berhad [2001] MLJU 638, HC (refd)

Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12, SC (refd)

Johnson and another v Davies and another [1998] 2 All ER 649; [1999] Ch 117, CA (refd)

Khiudin bin Mohd & Anor v Bursa Malaysia Securities Bhd and another application [2012] 6 MLJ 131, HC (refd)

Lina Joy v Majlis Agama Islam Wilayah & Anor [2004] 2 MLJ 119, HC (refd)

Mak Siew Wei v Dato' Dr Norbik Bashah bin Idris & Ors [2016] 11 MLJ 772, HC (refd)
Malbai v Nawi [1962] 1 MLJ 99 (refd)
R v International Stock Exchange of UK and Ireland, ex parte Else Ltd; R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex parte Else (1982) Ltd and another; R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex parte Roberts [1993] 1 All ER 420; [1993] QB 534, CA (refd)
R v Securities and Futures Authority ex p Panton (unreported) (refd)
Shahidan bin Shafie v Atlan Holdings Sdn Bhd & Anor [2015] MLJU 1944; [2017] 4 CLJ 587, CA (folld)
Suruhanjaya Sekuriti v Datuk Ishak bin Ismail [2016] 1 MLJ 733; [2016] 2 AMR 235, FC (refd)
Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd [2002] 2 MLJ 707; [2002] 3 CLJ 624, CA (refd)
Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v Bursa (M) Securities Bhd and another appeal [2013] 1 MLJ 158; [2013] 1 AMCR 213, CA (refd)
Tengku Jaffar bin Tengku Ahmad v Karpal Singh [1993] 3 MLJ 156; [1993] 2 AMR 35, HC (refd)
Yii Ming Tung v Public Prosecutor [2015] 3 MLJ 596, CA (refd)
Yung Ing Ing v Hunfara Construction Sdn Bhd [2015] 5 MLJ 668, CA (folld)

Legislation referred to

Capital Markets and Services Act 2007 ss 11, 58, 59, 67, 139B, 199(1), 201, 210, 212, 216, 216(1), 217, 217(1), (2), (3), (4), 218, 218(2), 219, 220, 221, 222, 223, 224, 225, 232, 234, 258, 288, 357, 357(1), 360, 360(1), (1)(a), (1)(b), (1)(c), (1)(d), (1)(A), (1)(B), (1)(C), (1)(D), (1)(E), (1)(F), (1)(G), (1)(H), (1)(I), (1)(J), (1)(K), (1)(L), (1)(M), (1)(N), (1)(O), (1)(P), (13)(c), Parts IV, VI, Division 2
Federal Constitution art 145(3)
Malaysian Code on Take-Over and Mergers 2010 s 9(1)
Rules of Court 2012 O 15 r 4(3), O 18 r 19(1)(a)
Securities Commission Act 1993, ss 15(1)(d), 33, 34, 34A, 34B, 34C, 153
Specific Relief Act 1950 s 41

Appeal from: Civil Suit No WA-22NCC-244–06 of 2016 (High Court, Kuala Lumpur)

Alex Tan Che Sian (Wong Kian Kheong & Partners) in Appeal Nos W-02(IM)(NCC)-2221–12 of 2016, W-02(IM)(NCC)-324–02 of 2017, W-02(IM)(NCC)-325–02 of 2017 and W-02(IM)(NCC)-326–02 of 2017 for the appellant.
Justin Wee Kim Fang (Justin Wee & Partners) in Civil Appeal No W-02(IM)(NCC)-2221–12 of 2016 for the respondent.

Richard Tee (Karen Tan with him) (Richard Tee & Chin) in Civil Appeal No W-02(IM)(NCC)-324–02 of 2017 for the respondent.
Tay Yee Boon (Felix Saw Chia Hui with him) (David Lai & Tan) in Civil Appeal No W-02(IM)(NCC)-325–02 of 2017 for the respondent.
Sankar a/l Supramaniam (Khaw & Partners) in Civil Appeal No W-02(IM)(NCC)-326–02 of 2017 for the respondent.

Zabariah Yusof JCA:

[1] The appellant (the plaintiff in the High Court) appeals against the decision by the learned judicial commissioner ('JC') in allowing the application by the first–fourth respondents (the first–fourth defendants in the High Court) in striking out the writ and the statement of claim of the appellant under O 18 r 19(1)(a) of the Rules of Court 2012.

[2] Parties shall be referred to as they were, in the High Court. The first, second, third, fourth and fifth defendants will be referred to as D1, D2, D3, D4 and D5 respectively.

[3] Each of the defendants filed their appeal to the Court of Appeal separately as follows:

(a) Civil Appeal No W-02(IM)(NCC)-2221–12 of 2016 concerns the appeal on the striking out application by D3;

(b) Civil Appeal No W-02(IM)(NCC)-324–02 of 2017 concerns the appeal on the striking out application by D2;

(c) Civil Appeal No W-02(IM)(NCC)-325–02 of 2017 concerns the appeal on the striking out application by D4; and

(d) Civil Appeal No W-02 (IM)(NCC)-326–02 of 2017 concerns the appeal on the striking out application by D1.

All the appeals were ordered to be heard together by order of the court dated 19 June 2017.

[4] After perusing the appeal records and hearing submissions from learned counsels, we dismissed the appeal by the plaintiff with costs for the reasons hereinafter stated.

BACKGROUND

[5] The plaintiff is a former employee and shareholder of 3,600 shares of D5.

[6] D1 is a director and shareholder whilst D2–D4 are shareholders of D5. **A**

[7] The pleaded claim by the plaintiff against D1–D4 is that, they were persons acting in concert with parties unknown, in acquiring jointly and severally the control of D5 through their collective shareholding of 33.74% shares in D5 wherein: **B**

a) D1 held 43,762,400 shares, equivalent to 18.25% of the voting shares in D5;

b) D2 held 3,597,700 shares, equivalent to 1.5% of the voting shares in the D5; **C**

c) D3 held 9,228,200 shares, equivalent to 3.85% of the voting shares in the D5; and

d) D4 held 24,327,875 shares, equivalent to 10.14% of the voting shares in the D5. **D**

[8] In doing so, the plaintiff alleged that D1–D4 had breached their statutory duties under the Capital Markets and Services Act 2007 ('the CMSA') and the Malaysian Code on Take-Over and Mergers 2010 ('the Take-Over Code') for their failure to make a mandatory general offer ('MGO') upon assuming control of D5 on 27 March 2012. **E**

[9] It is also pleaded that D1–D4, together with unknown parties had unlawfully conspired prejudicing the plaintiff's economic interest through unlawful means. Particulars of the alleged conspiracy are as listed in paras 12, 15–17 of the statement of claim. **F**

[10] The plaintiff in his statement of claim sought for, inter alia, declaratory as well as other reliefs that: **G**

(a) D1–D4 were persons acting in concert to obtain control of D5;

(b) D1–D4 had contravened s 218(2) of the CMSA and s 9(1) of the Take-Over Code upon their failure to undertake a MGO for the shares in D5; **H**

(c) damages for the losses suffered by the plaintiff as a result of the alleged breach of statutory duties by D1–D4; and

(d) an order to compel D1–D4 to undertake a MGO. **I**

[11] At this juncture, it is pertinent to note that the Securities Commission ('SC') has yet to make any ruling on D1–D4's purported contravention/breach of the CMSA and the Take-Over Code.

[12] D1–D4 filed their applications to strike out the plaintiff's claim under O 18 r 19(1)(a) of the Rules of Court 2012. The application by D3 was allowed by the High Court on 11 November 2016, whilst the applications by D1, D2 and D4 were allowed by the High Court on 18 January 2017.

ARGUMENTS BY THE DEFENDANTS

[13] D3 argued that to entitle the plaintiff to the reliefs sought, he must have the locus standi and an existing legal right and the court may in its discretion grant the declaratory reliefs (refer to s 41 of the Specific Relief Act ('the SRA')).

[14] The plaintiff pleaded two causes of action against the defendants ie breach of statutory duties and unlawful conspiracy. The statutory duties that the plaintiff is relying upon, are the statutory duties as stipulated under the CMSA.

The argument by the plaintiff that once he makes out the claim under the tort of unlawful conspiracy, he has no difficulty to meet the wordings of 'legal right' as stipulated under s 41 of the SR, is misconceived. The declaratory reliefs prayed for, by the plaintiff are in relation to a purported breach of the statutory duties under the CMSA which is not related to the tort of conspiracy at all. Hence the learned JC was correct in exercising her discretion in not granting the declaratory reliefs.

[15] The plaintiff claimed that his right to damages against the defendants is pursuant to ss 357(1) and 360 of the CMSA.

On the claim by the plaintiff under s 357 of the CMSA, it is premature, at this juncture, as there has not been any prior ruling by the SC on the contravention of the provisions of the CMSA and the Take-Over Code by the defendants. The defendants rely on the decision of the Court of Appeal in *Shahidan bin Shafie v Atlan Holdings Sdn Bhd & Anor* [2015] MLJU 1944; [2017] 4 CLJ 587 in the construction of s 153 of the Securities Commission Act 1993 ('the SCA') (which has since been repealed) which is in pari materia with s 357 of the CMSA.

As for the claim by the plaintiff under s 360 of the CMSA, the plaintiff bears the burden of satisfying the court that he had been aggrieved by an alleged contravention by the defendants of a 'relevant requirement', as under s 360 of the CMSA, the court's discretion is only exercisable on the application by a person aggrieved by an alleged contravention by another person of a 'relevant requirement'. Compliance of the Take-Over Code is not a contravention of a 'relevant requirement' as defined in s 360(13)(c) of the CMSA. The plaintiff failed to show any contravention of a 'relevant requirement' as defined, to

entitle him to invoke s 360(1)(d) of the CMSA. A

[16] Section 360 of the CMSA is not intended to compel the defendants to undertake a MGO and neither does it give the plaintiff the private right to enforce the MGO. B

[17] If s 360 of the CMSA is intended to confer on the courts with the discretion to compel the defendants to undertake a MGO upon the plaintiff's application, then the courts will deprive the SC of its statutory right pursuant to s 219 of the CMSA, to grant exemptions in writing to any person from the provisions of Division 2 of the CMSA, the Take-Over Code and any ruling made under s 217(4) of the CMSA. Granting this order would mean that this court is usurping the SC's discretion to grant an exemption. C

[18] Further, D1 and D2 submit that, in view of the court granting the application of striking out by D3 earlier, the plaintiff's claim is no longer sustainable against D1 given that the statutory minimum shareholding of 33% under ss 216(1) and 218(2) of the CMSA 2007 and s 9(1) of the Take-Over Code 2010 has not been met to require a MGO to be made. By reason of D3's striking out order earlier by the court, D3's purported shareholding in D5 can no longer be taken into account by the court. After excluding D3's shareholding, the collective shareholding of D1, D2 and D4 will only amount to 29.89% which is less than the statutory minimum shareholding of 33% as prescribed by CMSA and the Take-Over Code. Hence, D1, D2 and D4 cannot be categorised as persons who have control of D5 as defined in s 216 of the CMSA and the need to make a MGO does not arise against D1, D2 and D4. D E F

[19] It is also the pleaded case of the plaintiff that D1–D4 had conspired with 'other unknown parties' to jeopardise the plaintiff's economic interest through unlawful means. A perusal of para 12(c) of the statement of claim shows that the 'other unknown parties' refers to Wong Kim Sun, Lau Kok Fui and Teh Chai Leng. These tortfeasors were not named as co-defendants by the plaintiff. There was no reason given as to why they were not named as co-defendants. Such failure, had in effect discharged their liabilities. G H

[20] The plaintiff pleads that there is a concerted action by the co-conspirators towards the common end, namely to cause pecuniary loss and damage to the plaintiff. The defendants referred to the High Court cases of *Malbai v Nawi* [1962] 1 MLJ 99 and *Dato Abdullah bin Ahmad & Ors v Bank Bumiputra Malaysia Berhad* [2001] MLJU 638, to contend that the entire allegation of conspiracy cannot be sustain as the entire substratum of the plaintiff's claim falls by his failure to make the three individuals as co-defendants. Therefore, the plaintiff has no cause of action for damages against the defendants under the tort of conspiracy. I

[21] Further, courts will not grant academic declarations (see *Re Barnato (deceased); Joel and Another v Sanges and Others* [1949] 1 All ER 515; [1949] Ch 258). The declaratory relief prayed for, by the plaintiff is for a declaration that the defendants committed a criminal offence under the CMSA. In essence, the plaintiff is inviting the court to step in and usurp the powers of the attorney general. Once the court grants the declaratory relief of the contravention by the defendants, then there is no need for the attorney general to institute criminal charges against the defendants. The declaratory reliefs will then be academic as the plaintiff cannot enforce them by way of a criminal prosecution (see the case of *Tengku Jaffar bin Tengku Ahmad v Karpal Singh* [1993] 3 MLJ 156; [1993] 2 AMR 35.)

[22] In addition, civil courts will not entertain matters pertaining to criminal jurisdiction (see *Lina Joy v Majlis Agama Islam Wilayah & Anor* [2004] 2 MLJ 119 at para 51).

[23] The SC is tasked to regulate the take-over and mergers of companies (see s 15(1)(d) of the SCA). It is also clear that the SC is mandated to administer the Take-Over Code (see s 217(4) of the CMSA).

Section 11 of the CMSA empowers Bursa to carry out its duties to ensure an orderly and fair market in the securities or derivatives that are traded through its facilities.

It is not for the courts to usurp the functions of the market regulatory bodies like the SC and the Bursa in carrying out its objective as stipulated under the law. In addition, it is a trite principle of law that a court will not second guess the decisions of the market regulators (see *R v Securities and Futures Authority ex p Panton* (unreported) where Sir Thomas Bingham said that:

> It seems to me quite plain they are bodies over whom the court can, in appropriate circumstances, and will exercise a supervisory jurisdiction, but recognition of that jurisdiction must in my judgment be combined with a recognition that the clear intention of the Act is that the bodies established under the Act should be regulatory bodies and that it is not the function of the court in anything other than a clear case to second guess their decisions or, as it were to look over their shoulder.

[24] The same principle was referred to and approved in our local case of *Bursa Malaysia Securities Bhd v Gan Boon Aun* [2009] 4 MLJ 695 at p 719 and *Shahidan Shafie* where the Court of Appeal in its decision in *Shahidan Shafie* said that:

> If we were to adopt the interpretation of s 153 of the SC Act of the plaintiff, it would amount to the court stepping into the shoes of the Securities Commission which is

tasked to supervise and regulate the conduct of companies. As we have said earlier, that is not and cannot be the intention of Parliament ...

(Also refer to *R v International Stock Exchange of UK and Ireland, ex parte Else Ltd; R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex parte Else (1982) Ltd and another; R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex parte Roberts* [1993] 1 All ER 420; [1993] QB 534).

ARGUMENTS BY THE PLAINTIFFS

[25] It is the submission of the plaintiff that once he makes out a claim under the tort of unlawful conspiracy, he will be able to meet the requirement of 'legal right' under s 41 of the SRA. The plaintiff also submit that apart from the provision of s 41 of the SRA, the court has the inherent power to grant the declaratory reliefs sought for by the plaintiff.

[26] The learned JC erred when she equated the non-joining of the other parties as co-defendants, as a form of release. It is settled law that where two or more persons are liable for the tort of conspiracy, liability of each is joint and several, as was pleaded in this case. As a rule, where liability is joint and several, a plaintiff is entitled to sue whomsoever he wishes. This is provided under O 15 r 4(3) of the Rules of Court 2012. The issue as to whether there was in fact a release of the other co-conspirators is a matter to be adjudicated upon, at full trial based on evidence adduced.

[27] On *Shahidan Shafie*, the plaintiff submits that it was decided per incuriam and the plaintiff invites the court not to follow *Shahidan Shafie* for the following reasons:

(a) s 357 of the CMSA is clear and unambiguous and ought to be given a literal construction;

(b) there is no requirement of any prior ruling from the SC of any contravention to be obtained before the claim for the loss can be made under s 357 of the CMSA. Apart from s 357 of the CMSA there are other similar provisions, namely ss 199(1), 201, 210 of the CMSA which provides for similar provisions where the person who suffers loss or damage by reason of the conduct of another person who has contravened the provisions of the CMSA may recover the amount of loss or damage by instituting civil proceedings against the other person, regardless whether the other person has been charged with an offence in respect of the contravention or whether or not such contravention has been proved in a prosecution;

(c) it is incomprehensible to require an aggrieved person to first secure a

ruling from the SC bearing in mind that the section sets down the limitation period for the aggrieved person to commence civil proceedings, in the event SC's rulings comes after six years. The law on this issue is unsettled and hence it raises questions of law that are sufficiently arguable to justify proceeding to trial. The issue of limitation was never considered by the court in *Shahidan Shafie* and by the learned JC in our present case; and

(d) to construe a ruling from SC is necessary before a claim for economic loss can sustain is contrary to the overall scheme of the CMSA.

[28] The plaintiff is of the view that the interpretation of the learned JC in the High Court case of *Mak Siew Wei v Dato' Dr Norbik Bashah bin Idris & Ors* [2016] 11 MLJ 772 is to be preferred, in the construction and interpretation of the scope of s 357 of the CMSA, where prior ruling of the SC is not a pre requisite before a claim of damages under s 357 of the CMSA can be instituted.

[29] The learned JC erred in concluding that ss 357 and 360 cater for different situations and took an over simplistic approach in construing s 360 of the CMSA when she found that the obligation on the part of the defendants to make a MGO was not a 'relevant requirement'. There is nothing in s 360 of the CMSA which limits its application to breach or non-compliance of a provision where the word 'requirement' appears.

[30] The plaintiff is of the view that this court in *Shahidan Shafie* failed to consider s 360 of the CMSA. Section 360 of the CMSA can stand alone and is independent of s 357 of the same.

[31] The learned JC also erred when she held that the declaratory relief sought by the plaintiff is academic. The declaratory relief relates to a contravention of a provision of the CMSA which also gives rise to a civil remedy and it is not abstract or hypothetical.

THE FINDINGS BY THE LEARNED JC

[32] The learned JC allowed the striking out applications by the defendants premised upon the following:

(a) the plaintiff does not have the locus standi and an existing right to seek for the declaratory relief prayed for. Section 357 of the CMSA does not confer a private cause of action to the plaintiff to claim for pecuniary loss against the defendants due to contravention by the defendants of the provisions of the CMSA or its regulations thereunder, without a prior ruling from the SC as to the alleged contravention. Section 360 of the

CMSA is not applicable as it does not confer upon the court the powers to grant declaratory reliefs for failure to comply with the Take-Over Code. The court is bound by *Shahidan Shafie*. Where the plaintiff has not obtained the prior ruling from the SC prior to the commencement of the suit, he does not have a cause of action to ask for damages. Hence the claim by the plaintiff for damages under s 357 of the CMSA is premature;

(b) s 360 of the CMSA envisaged a situation where one becomes an aggrieved person only when there is a contravention of a 'relevant requirement'. The requirement can be ascertained via an objective test. Compliance with the Code is not a 'relevant requirement'. The word 'requirement' is not found in ss 217–220 of the CMSA, thus s 360 of the CMSA is not intended to confer on the plaintiff a right to apply to compel the defendants to undertake a MGO;

(c) Division 2 of Part VI of the CMSA does not provide for a private right to enforce the Take-Over Code. Section 220 of the CMSA (which is in Division 2 Part VI) provides for recourse to the SC to take action in cases of non-compliance with the Take-Over Code. The learned JC was of the view that s 360 of the CMSA does not apply to Division 2 Part VI and that ss 220 and 360 of the CMSA cannot be the same;

(d) the learned JC disagreed with the findings in *Mak Siew Wei* as there was no consideration of s 41 of the SRA, the relevant requirement under s 360 of the CMSA and the different components of the reliefs sought;

(e) the plaintiff is not entitled to the declaratory reliefs sought under ss 357 and 360 of the CMSA and that the relief sought is academic as it is unacceptable that criminal law should be enforced by means of civil proceedings through a mere declaration;

(f) the plaintiff cannot sustain the action of conspiracy as he failed to make certain individuals as co-defendants. The learned JC was of the view that, a charge of collusion or conspiracy cannot be sustained when not all tortfeasors are charged or sued in the same case, as the entire substratum of the claim is affected by the failure of the plaintiff to make the three individuals named in para 12(c) of the statement of claim as co-defendants. The learned JC held that the failure to include them as co-defendants amounts to a release of their liability; and

(g) D1, D2 and D4 filed similar applications for striking out as D3 which was struck out earlier by the court. D1, D2 and D4 contend that since the plaintiff's writ and statement of claim had been struck out against D3, the plaintiff's claim against D1, D2 and D4 is no longer sustainable as D1, D2 and D4's collective shareholding amount only to 29.89% which is less than the statutory minimum requirement shareholding of

33% as prescribed by CMSA and the Take-Over Code for MGO to take effect. Hence the plaintiff does not have a cause of action against D1, D2 and D4.

OUR DECISION

Whether the plaintiff has the locus standi and existing right

[33] We disagree with the argument of the plaintiff that his legal right as required under s 41 of the SRA is triggered once he makes out a claim under the tort of unlawful conspiracy. There is no nexus between the declaratory relief sought, to the pleading of unlawful conspiracy. The tort of unlawful conspiracy does not give the court the power to grant the declaratory order that the defendants contravened the provisions of the CMSA. The plaintiff must have an existing legal right, to be entitled to the declaratory reliefs sought. What the plaintiff is seeking from this court is for reliefs which he is not entitled to under ss 357 and 360 of the CMSA.

Sections 357(1) and 360 of the CMSA do not empower the court to grant the Plaintiff the declaratory reliefs sought for. Section 357(1) of the CMSA is to cater for the recovery of pecuniary losses and s 360 of the CMSA confers the court with a discretionary power to make a variety of orders (which will be elaborated in detail in the later part of this judgment).

The facts and circumstances of the present case show that the plaintiff does not possess the required standing or the legal right to seek for the declaratory reliefs prayed for, in the claim.

Whether a ruling from the SC is a requirement before s 357 of the CMSA applies

[34] The claim by the plaintiff on breach of statutory duties places heavy reliance on s 357 of the CMSA which states:

> (1) A person who suffers loss or damage by reason of, or by relying on, the conduct of another person who has contravened any provision of Part V1 or any regulations made under this Act may recover the amount of the loss or damage by instituting civil proceedings against the other person whether or not that other person has been charged with an offence in respect of the contravention or whether or not a contravention has been proved in a prosecution.
>
> (2) Notwithstanding the provisions of any written law relating to limitation of time, an action under subsection (1) may be begun at any time within six years from the date on which the cause of action accrued or the date on which the person referred to in subsection (1) became aware of the contravention, whichever is the later.

[35] The learned JC held that prior ruling by the SC of contravention is mandatory before a private action under s 357 of the CMSA can be invoked. The learned JC finds support in *Shahidan Shafie* where this court held that a breach of the SCA and Take-Over Code does not give rise to an independent private cause of action for breach of statutory duties under s 153 of the SCA until the SC has made a ruling.

[36] The plaintiff submits that *Shahidan Shafie* was decided per incuriam and the plaintiff invites this court not to follow *Shahidan Shafie* and submits that s 357 of the CMSA ought to be given its literal and ordinary construction in view of the wordings being explicit and unambiguous.

[37] We disagree with the arguments of the plaintiff in this respect for the reasons that follow.

[38] We do not deny the wordings of s 357 of the CMSA which made no mention of any prior ruling from SC before a plaintiff can make a claim of pecuniary loss as a result of a contravention of the provisions of the Act. However, in construing s 357 of the same, it should not be read literally and in isolation, oblivious to the other provisions of the CMSA. Section 357 must be looked at holistically, together with the other provisions of CMSA and the conceptual context in which it was drafted. This aspect was addressed in *Shahidan Shafie* at paras 24 and 28 of the judgment.

[39] By the very nature of the declaratory reliefs prayed for, essentially the plaintiff seeks a declaration that the defendants committed a criminal offence under the CMSA. Before such a declaration can be made there must be a determination of a contravention. By filing his claim in the civil courts the plaintiff is seeking for such determination to be made by the civil court in a civil proceeding. Such cannot be the case. The burden of proof between the two is different. Essentially, it is not for the civil courts to intrude into the domain of the criminal court. That cannot be the intention of s 357 of the CMSA.

[40] It is the attorney general who has the conduct of prosecutions and not the court. It is also the prerogative of the attorney general under art 145(3) of the Federal Constitution to institute, conduct or discontinue any proceedings for an offence. By asking for the declaratory reliefs, the plaintiff is urging this court to usurp the powers of the public prosecutor, who has control of criminal prosecutions in the country. We agree with the submission of D3 that this is a collateral attempt to bypass the role of the attorney general, and if allowed will open floodgates to litigation of this nature.

[41] Criminal law cannot be enforced by civil proceedings to obtain a declaration that a criminal offence has been committed. This principle is aptly

ruled in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12, by Salleh Abas LP wherein he said that:

> It is unacceptable that criminal law should be enforced by means of civil proceedings for a declaration when the court's powers to grant that remedy is only at the discretion of the court. Jurisdiction of a criminal court is fixed and certain. The standard of proof in a criminal case is different from that required in a civil case and moreover the Attorney General is the guardian of public interest and as the public prosecutor, he, not the court, is in control of all prosecutions.

[42] Similarly, it is not for the courts to usurp the function of the market regulatory bodies in carrying out its objective as stipulated under the law. The functions of the SC are statutorily provided in s 15(1)(d) of the SCA, where it is tasked to regulate the take-over and mergers of companies. Section 217(4) of the CMSA provides that:

> The Commission shall administer the Code and may do all such things as may be necessary or expedient to give full effect to the provisions of this Division and the Code and without limiting the generality of the foregoing-
>
> (a) issue rulings —
>
> (i) to interpret this Division and the Code;
>
> (ii) on the practice and conduct of persons involved in or affected by any take-over offer, merger or compulsory acquisition, or in the course of any take-over, merger or compulsory acquisition; and
>
> (b) enquire into any matter relating to any take over offer, merger or compulsory acquisition whether potential or otherwise, and for this purpose, may issue public statements as the Commission thinks fit with respect thereto.

[43] Gleaning through the provisions of the CMSA, it is the intention of the Act that the bodies established under the Act are regulatory bodies and it is not the function of the court to usurp their function nor to second guess their decisions. In *R v International Stock Exchange of UK and Ireland, ex parte Else Ltd; R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex parte Else (1982) Ltd and another; R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd, ex parte Roberts* [1993] 1 All ER 420; [1993] QB 534, Lord Bingham observed that 'the court will not second guess the informed judgment of responsible regulators steeped in knowledge of their particular market'. This court applied the same principle in *Shahidan Shafie* in arriving at its decision when interpreting s 153 of the SCA. To interpret otherwise would result in a situation where there would be two decisions, one of the court and the other from the SC. That cannot be the position in law (refer to para 29 of *Shahidan Shafie*). The courts have shown a reluctance to interfere with the decision of regulatory bodies in carrying out its objective in the absence of mala fide or acting in excess of jurisdiction. A similar

stance was taken by this court in *Bursa Malaysia Securities Berhad* and also in *Khiudin bin Mohd & Anor v Bursa Malaysia Securities Bhd and another application* [2012] 6 MLJ 131 which had referred to various commonwealth jurisdictions, which demonstrated the attitude of the courts in reviewing the decision made by the regulators in different jurisdictions. Therefore, it is not within this court's jurisdiction to interfere with the duties mandated to the market regulatory bodies in maintaining and promoting the interests of the public in dealing on the exchange and these bodies should be left to carry out its objective as stipulated under the Act.

[44] Therefore, a person who has suffered loss or incurred damage may institute a civil action to recover the amount of the loss or damage after a contravention of any provision or any regulations made under the CMSA has been determined by the SC. It is not necessary for the courts to adjudicate whether there is a contravention of the Act before s 357(1) of the CMSA can be applied. All that is required is for the SC first to determine whether there was a contravention.

[45] In *Shahidan Shafie*, this court considered the application of s 153 of the SCA, together with other provisions of the SCA in arriving at its decision, namely ss 33–34C of the SCA which are in pari materia with ss 216–225 of the CMSA. Sections 216–225 of the CMSA are in Division 2 Part VI of the same. Hence s 153 of the SCA was not considered in isolation by this court then. The court in *Shahidan Shafie* has undertaken the correct purposive approach in determining the scope and applicability of s 153 of the SCA and to reflect the intention of Parliament.

Sections 357 and 360 of the CMSA

[46] Apart from s 357 of the CMSA, the plaintiff also relies on s 360 of the CMSA in his claim against the defendants. The plaintiff submits that the learned JC erred when she concluded that s 360 of the CMSA was not applicable because the obligation on the part of the defendants to make a take-over offer was not a 'relevant requirement' under s 360 of the CMSA. The learned JC premised her decision on the fact that the word 'requirement' does not appear in ss 217–220 of the CMSA. The effect of the learned JC's decision would be that s 360 of the CMSA is only applicable to a breach or contravention of the provisions in CMSA where the word 'relevant requirement' appears. The plaintiff submitted that this is where the learned JC erred when the word 'requirement' must be given its ordinary meaning ie a requirement which is imposed by or under the CMSA. There is nothing in s 360 of the CMSA which limits its application to breach or non-compliance where the word 'requirement' appears. In any event, plaintiff is of the view that the word 'relevant requirement' under s 360 of the CMSA is a novel area of the

law which has not been specifically considered by the Federal Court. In the circumstances the plaintiff submits that further argument on this novel point of law is necessary and therefore, the plaintiff's claim is unsuitable to be struck out.

[47] We are not persuaded by the arguments from the plaintiff in this respect.

Firstly, although this may be a novel point of law, it does not justify it going to trial as the facts are not in dispute. The issues are in relation to the interpretation of ss 357 and 360 of the CMSA, therefore it concerns the construction of the relevant sections of the CMSA. Evidence of witnesses with regard to the construction of provisions of the CMSA is of no effect and irrelevant.

Secondly, we agree with the learned JC's findings that ss 357 and 360 of the CMSA cater for two separate eventualities.

Section 357 of the CMSA is a specific provision which confers the right to a plaintiff to claim for pecuniary losses due to the act of the other party who had contravened the provisions of CMSA or its regulations, whilst s 360 of the CMSA is a general provision which confers upon the court with discretion to make various orders where *it appears* to the court that certain persons had 'contravened a relevant requirement'. Section 360 of the CMSA confers the right to claim on three classes of persons or bodies to apply to court to make one or two of the orders as prescribed in s 360(1)(A)–(P) of the same. The three classes of persons are:

(a) the SC (ss 360(1)(a) and (b) of the CMSA);

(b) the Bursa, exchange holding company, futures exchange or an approved clearing house (s 360(1)(c) of the CMSA); and

(c) *a person aggrieved by an alleged contravention by another person of a relevant requirement (s 360(1)(d) of the CMSA).*

[48] The word 'relevant requirement' is used in s 360(1)(a), (c) and (d) of the CMSA. It appears from the reading of s 360 of the CMSA that a contravention of a 'relevant requirement' is a condition precedent before a person aggrieved can invoke s 360 of the CMSA.

[49] The word 'aggrieved person' is not defined in the CMSA, however, under s 360(1)(d) of the CMSA, it appears that an 'aggrieved person' is a person aggrieved by an alleged contravention by another person of a 'relevant requirement'. The term 'relevant requirement' is defined in s 360(13)(c) of the CMSA where it provides that:

(13) For the purposes of this section, 'relevant requirement' —

(c) in relation to an application by the *aggrieved person*, *means* a requirement — A

(i) which is imposed by or under this Act;

(ii) which is imposed as a condition or restriction of any approval or licence that is given or issued under or pursuant to this Act or any securities laws;

(iii) which is imposed by or under the rules of a stock exchange, a derivatives exchange or an approved clearing house. B

[50] The usage of the word 'means' in s 360(13)(c) of the CMSA indicates that 'relevant requirement' is meant to be exhaustive, restrictive and not open-ended, as opposed to the word 'includes' (refer to *Yii Ming Tung v Public Prosecutor* [2015] 3 MLJ 596 and *Tenaga Nasional Bhd v Tekali Prospecting Sdn Bhd* [2002] 2 MLJ 707; [2002] 3 CLJ 624). C

[51] The CMSA expressly provides for requirements to be complied with in various sections of the Act, namely: D

(a) s 58 — Requirement for Capital Markets Services Licence;

(b) s 59 — Requirement for Capital Markets Services Representative's Licence; E

(c) s 67 — Minimum Financial Requirements;

(d) s 139B — Requirement for approval to establish or operate a private retirement scheme administrator; F

(e) s 212 — Requirement for approval, registration, authorization or recognition;

(f) s 232 — Requirement to register prospectus in relation to securities;

(g) s 234 — Requirement to lodge prospectus with Registrar; G

(h) s 258 — Requirement for trust deed and trustee; and

(i) s 288 — Requirement for trustee and deed.

Whether compliance with the Take-Over Code is a 'relevant requirement' under the CMSA H

[52] Thus, the question arises whether compliance with the Take-Over Code is a 'relevant requirement' under the CMSA.

I

[53] The Take-Over Code is prescribed by the Finance Minister on the recommendation of the SC — s 217(1) of the CMSA. The Finance Minister, may from time to time, on the recommendation of the SC, amend the provision of the Take-Over Code — s 217(2) of the CMSA. The Take-Over

Code contains principles governing take-over offer, merger or compulsory acquisition — s 217(3) of the CMSA.

[54] The word 'requirement' does not appear in ss 217–220 of the CMSA. In fact, s 218 of the CMSA uses the words 'compliance with Code, guidelines, directions and practice notes and rulings'. What is the rule of construction to be applied when there are such wordings in the legislation? In the Court of Appeal case of *Yung Ing Ing v Hunfara Construction Sdn Bhd* [2015] 5 MLJ 668 this court had the occasion to consider the implication of such wordings in the statute, when Parliament includes a particular term in one part or section of the statute but omits it in another part or section of the same statute. In such instance this court held that:

> [29] ... it is a principle of interpretation of statutes that where the Legislature includes a particular term in one part or section of a statute but omits it in another part or section of the same, it must be presumed that the Legislature acts intentionally and purposely in the disparate inclusion or exclusion. There are the principles of construction as pointed out by *Bennion on Statutory Interpretation* (LexisNexis (5th Ed) at p 157, 1160): Construction as a whole requires that, unless the contrary appears, three principles should be applied. These are that every word in the Act should be given a meaning, the same word should be given the same meaning, and different words should be given different meanings.
>
> *Every word to be given meaning* On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment. It is presumed that if a word or phrase appears, it was put there for a purpose and must not be disregarded.
>
> *Different words to be given different meanings* Similarly it is presumed that the drafter did not indulge in elegant variation, but kept to a particular term when wishing to convey a particular meaning...
>
> [30] Therefore, the inclusion of the word 'cheque' in limb (c) of sub-s (2) of s 121 and the exclusion of the word 'cheque' in the latter limb of that subsection was done intentionally and purposely by Parliament; and the court must give effect to the intention of Parliament: that whilst the former limb (limb (c)) applies to cheques, the latter (subsequent) limb does not.

[55] Therefore, guided by the principle of construction in the above case, as the word 'requirement' is not found in ss 217–220 of the CMSA, it must therefore follow that it was never the intention of Parliament when it legislated s 360 of the CMSA to confer on the plaintiff a right to apply to court to compel the defendants to undertake an MGO. This is fortified further if one is to examine the provisions of Division 2 of Part VI of the CMSA (comprising of ss 217–220). This is in pari materia with Division 2 Part IV of the SCA (comprising of ss 33–34C).

Division 2 Part VI of the CMSA

[56] Division 2 Part VI of the CMSA does not provide for any right of a dissenting shareholder to apply to the courts for an order to compel the defendants to undertake a MGO. These rights of the minority shareholders are provided for under s 223 and 224 of the CMSA, however the provisions do not provide for a private right to enforce the Take-Over Code. If Parliament intended for a private right to enforce the Take-Over Code, it would have been provided for in either ss 223 or 224 or in any of the provisions in Division 2 of Part VI of the CMSA.

[57] Sections 217 and 218 CMSA are specific provisions in relation to compliance to the Take-Over Code. Section 220 of the same provides for recourse to the SC for action to be taken in cases of non-compliance of the Take-Over Code. Section 360(1)(a) of the CMSA also provides a recourse for SC to obtain certain orders from the courts if there is a contravention of a 'relevant requirement'. This was illustrated in the Federal Court case of *Suruhanjaya Sekuriti v Datuk Ishak bin Ismail* [2016] 1 MLJ 733; [2016] 2 AMR 235 where s 360(1) of the CMSA was invoked by SC. The court granted an ex parte interim injunction pursuant to s 360 of the CMSA restraining the respondent from dissipating or dealing with funds believed to be proceeds of offences committed by the respondent under the security provisions. Another instance where s 360 of the CMSA was applied, is in the Court of Appeal case of *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v Bursa (M) Securities Bhd and another appeal* [2013] 1 MLJ 158; [2013] 1 AMCR 213 where the respondent successfully applied under s 360(1)(c) of the CMSA for orders to enforce penalties for breaching the listing requirement.

[58] We agree with the submission of counsel for D3, that if the phrase 'relevant requirement' in s 360 of the CMSA applies to Division 2 Part VI of the CMSA (in which s 220 is part therein), then it would render s 220 superfluous as it would result in overlapping with s 360(1)(a) of the CMSA. To interpret and construe such that the SC has the right of recourse against non-compliance with the Take-Over Code pursuant to ss 220 *and* 360 of the CMSA is not harmonious but absurd.

[59] In addition, s 219 of the CMSA confers on the SC the statutory right to grant exemption in writing to any person from the provisions of Division 2, the Take-Over Code and any ruling made under s 217(4) of the same. Parliament would be acting in vain in enacting s 219 of the CMSA if the courts are conferred with the power to take away the statutory right accorded to the SC under s 360 of the same.

[60] Therefore, it is our conclusion that it was never the intention of the legislature that s 360 of the CMSA is to confer a private right to compel the defendants to undertake a MGO.

[61] The plaintiff relied heavily on *Mak Siew Wei* whereby the learned JC held that s 357 of the CMSA allows any person who have suffered loss or damage as a result of the breach by another in not complying with the mandatory general offer requirements, the right to recover by instituting civil proceedings against the person in breach, without the need for the SC to make a prior ruling that there was a breach, or whether a person has been acting in concert to obtain control, or that there was a breach as a result. The court in *Mak Siew Wei* held that:

> [6] The decision in Shaidan Shafie was based on the construction of s 153 of the Securities Commission Act 1993, which has since been repealed. Although subsequently resurrected in identical versions, it was removed from the SCA and instead now found in s 357 in an entirely different legislative framework and contextual existence of the much consolidated CMSA, justifying a fresh examination of the true jurisdictional remit of s 357.

[62] This court in *Shahidan Shafie* 'apart from giving the words used their natural meaning' did not look at s 153 of the SCA 'in isolation but viewed it in the context of the other provisions in the Act so as the whole Act can be read consistently' (refer to paras 23, 24 and 25 of the judgment of *Shahidan Shafie*).

[63] The court in *Mak Siew Wei* failed to address the difference in the scope of s 357 and the generality of s 360 of the CMSA. It also failed to address the issue on the usurping of the powers of the SC and the powers of the attorney general in the institution of prosecution of criminal cases. The learned JC in *Mak Siew Wei* said in his judgment at para 59 at p 809 of the report that:

> [59] The fundamental and pivotal point is for all intents and purposes, for the claimant to establish his case of a contravention by the alleged defaulter occasioning a loss to the former on the civil standard of proof of a balance of probabilities. This requires the parties to invoke the civil litigation court processes and procedures principally in respect of pleadings and discovery to present a case of contravention of the relevant mandatory offer provisions.

[64] The effect of that stance may create a situation that, there may be two conflicting decisions between the SC and the civil courts, as we have alluded to in the earlier part of this judgment. How do we reconcile such differences?

We are of the view, that cannot be the case. Such interpretation would create an absurd situation, which cannot be the intention of the legislature. It makes more sense if we are to construe that s 357 of the CMSA can only be invoked once there is a ruling from the SC as to whether there is a contravention rather

than be left to the civil courts to make such findings. *Shahidan Shafie* had addressed the problem that could be encountered if prior ruling from the SC was not obtained as follows:

> [29] ... Our interpretation reconciles s 153 with the other provisions in the SC Act and that is the private cause of action for breach of statutory duty is preserved to the extent only after the Securities Commission has made a specific ruling. This would avoid a situation where there would be two decisions, one of the court and the other the Securities Commission. This scenario would bring uncertainty to the business world which must be avoided. Our interpretation allows only one decision at one time and that is the decision of the Securities Commission until the same is either set aside or substituted by the courts.

[65] The court in *Mak Siew Wei* also failed to consider s 41 of the SRA as to the existence of the rights of the plaintiff therein in seeking for a declaration that the seven defendants were acting in concert to obtain control of the eighth defendant (company), that they had contravened s 218(2) of the CMSA and s 9(1) of the Take-Over Code for their failure to undertake a MGO for the shares in the eighth defendant. Like in our present case, the defendants therein also submitted that the plaintiff's claim on the tort of unlawful conspiracy could not be sustain premised on the same alleged breach of the CMSA and the Take-Over Code, which, following from *Shahidan Shafie* was only actionable if there was a prior ruling of the same by the SC.

[66] The learned JC in *Mak Siew Wei* took into account the policy of the SC in introducing the new Bill of CMSA which promotes activism from the public whereby the court referred to the Corporate Governance Blueprint 2011 issued by the SC which states that 'Malaysian laws empower shareholders to seek civil remedies through private enforcement actions ...'. That statement failed to provide any assistance in the construction of s 357 of the CMSA as to whether prior ruling from SC is required. There is no doubt that private action is available, as held by this court in *Shahidan Shafie*, but a prior ruling of contravention from the SC must be obtained.

Whether the non-joining of the other parties as co-defendants amounts to a release

[67] The plaintiff's pleaded case is that the defendants are jointly and severally liable for the acts of unlawful conspiracy, where they pleaded as follows:

> 17. Setiap tindakan yang dinyatakan di atas telah dilakukan oleh pihak-pihak yang disebut di atas, sama ada bagi pihak mereka sendiri atau pun bagi pihak pekomplot-pekomplot yang lain menurut konspirasi yang disebut di atas. Selanjutnya atau secara alternatifnya, Defendan-defendan ialah pelaku-pelaku tort bersama (*joint tortfeasors*).

[68] It is trite law that where there are two or more persons liable for the tort of conspiracy, and where the liability of each person is joint and several, a plaintiff is entitled to sue whomsoever that he wishes (see the Court of Appeal of Singapore case of *Chan Kern Miang v Kea Resources Pte Ltd* [1998] 2 SLR (R) 85 at p 91). This is fortified by O 15 r 4(3) of the Rules of Court 2012 which states:

> *Where relief is claimed in an action against a defendant who is jointly liable with some other person and also severally liable, that other person need not be made a defendant to the action*; but where persons are jointly, but not severally, liable under a contract and relief is claimed against some but not all of those persons in action in respect of that contract, the court may, on the application of any defendant to the action, by order stay the proceedings in the action until the other persons so liable are added as defendants.

[69] The learned JC concluded that the plaintiff's cause of action on conspiracy is unsustainable due to the purported failure of the plaintiff to join three other individuals who were mentioned in the statement of claim as co-defendants (non-joinder issue). The learned JC was of the view that such non inclusion amounts to a release of the joint tortfeasors. The learned JC referred to the High Court case of *Malbai* in support, where Rigby J highlighted the general rule that where there is a joint cause of action against two or more persons, a discharge as against one of them operates as a discharge against all, if it *is proven* that there is a concerted action towards the common end. The learned JC in her grounds also referred to the case of *Dato Abdullah bin Ahmad & Ors* where the issue of the release of a joint tortfeasor was raised and the court dismissed the allegation of conspiracy when one of the party ceased to be a party in the suit. Hence the learned JC found that a charge of collusion or conspiracy cannot be initiated when not all tortfeasors are charged or sued in the same case.

[70] We disagree with the conclusion arrived at, by the learned JC in this respect.

In cases of a joint cause of action or joint tortfeasors, the issue on whether there was a release of any tortfeasor has to be determined after having regard to the facts and circumstances of the case (see *Johnson and another v Davies and another* [1998] 2 All ER 649; [1999] Ch 117). In *Malbai* where there is a joint cause of action against two or more persons, settlement and payment of compensation by one tortfeasor to the plaintiff was held by the court as not constituting a release of liability of the other tortfeasor as it was found that the criminal act by the two tortfeasors was separate and distinct. This was a finding after a full trial. Similarly, in *Dato' Abdullah bin Ahmad & Ors*, it involved a claim by Dato Abdullah Ahmad (the plaintiff) against BBMB, Sykt Permodalan Kebangsaan (SPK) and Dato Ahmad Azizuddin (the defendants).

The contention by Dato Abdullah Ahmad was that BBMB had colluded with Dato' Ahmad Azizuddin to cheat so as to deprive Dato Abdullah Ahmad of the SPK Shares. There was a settlement agreement and withdrawal of the claim by Dato Abdullah Ahmad against BBMB. The court concluded that the settlement agreement and withdrawal of the claim by Dato Abdullah Ahmad against BBMB had resulted in 'the substratum of the claim by the Dato' Abdullah against BBMB and Dato Ahmad Azizuddin evaporated the moment BBMB ceased to be a party' to the proceedings'. Essentially, there were facts in which the court could make a finding as to whether there was indeed a release of the tortfeasors.

[71] Coming back to our present case, such findings on the release of the joint tortfeasors due to non-inclusion, is too early to be determined at this stage, and the learned JC erred in this respect when she concluded that the non-inclusion of the other tortfeasors amounts to a release of their liability. The application for striking out herein is under limb (a) of O 18 r 19(1) of the ROC and therefore no other evidence except the pleadings which is available before the court. Whether there was a release of the other joint torfeasors is a matter for the defendants to plead in their respective defences and for the learned JC to decide after hearing the evidence, whether there was indeed an intention of the plaintiff to release the other joint tortfeasors. In our present case the defendants have yet to file their defences.

[72] Therefore, the learned JC's conclusion on the non-joinder issue is clearly misconceived.

[73] On the issue that the plaintiffs claim cannot be sustained as against D1, D2 and D4 in view of the D3's earlier striking out application which renders the threshold of 33% requirement no longer available for the MGO to take effect, we are of the view that this argument from the defendants cannot stand. The claim is that all the defendants have contravened the CMSA in failing to make the MGO and they have engaged in an unlawful conspiracy to deprive the plaintiff of the MGO. The act of the defendants ought to be taken together. It was unfortunate that the striking out action by D3 was heard earlier. In any event, the defendants' appeals are all taken together before us.

CONCLUSION

[74] Therefore, we are unanimous in our view that the learned JC did not err when she found that the plaintiff failed to fulfill the criteria that he has an existing legal right and that he has no locus standi to seek for the declaratory relief that he is seeking in the statement of claim. He failed to show his entitlement of a right to the declaration.

[75] The plaintiff is not entitled to the declaratory reliefs under ss 357 and 360 of the CMSA as pleaded as those provisions do not empower the court to grant the plaintiff the declaratory reliefs that he prayed for. The plaintiff is not entitled to damages and also not entitled to compel the defendants to undertake a MGO.

[76] Therefore the plaintiff does not have a cause of action against the defendants. We find no appealable error on the part of the learned JC in striking out the plaintiff's writ and statement of claim under O 18 r 19(1)(a) of the ROC 2012.

[77] The appeal by the plaintiff is dismissed with costs. The decision of the learned JC is affirmed.

Appeal dismissed with costs; decision of learned judicial commissioner affirmed.

Reported by Dzulqarnain Ab Fatar